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## Prospective Parents and the Children's Rights Convention

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# PROSPECTIVE PARENTS AND THE CHILDREN’S RIGHTS CONVENTION

BY CARTER DILLARD\*

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## INTRODUCTION

Can States Parties interpret the Convention on the Rights of the Child (“CRC” or “Convention”)<sup>1</sup> as creating obligations on prospective parents with respect to their prospective children, and

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1. Convention on the Rights of the Child, Sep. 2, 1990, 1577 U.N.T.S. 3.

implement the Convention so as to alter domestic norms regarding the right to procreate? The CRC sets forth rights-based rules and standards for the protection and furtherance of children's interests, and states objective norms regarding how children should be treated and the conditions in which they should live, which must be implemented by states parties. It thus seeks to change the circumstances in which children are and will be living.

Although, at a very basic level, a child's circumstances depend upon the circumstances of its procreation, subject matter experts who write about the CRC do not seem to have considered whether a state party might partially fulfill its obligations by placing legal obligations on prospective parents—influencing not just a child's environment, but also the act of procreation by which that child enters into its environment. For example, Thomas Hammarberg, in his article *The U.N. Convention on the Rights of the Child—and How to Make it Work*, never mentions the relationship between prospective parents and their future children, but instead focuses exclusively on the relatively static world of extant children and their rights.<sup>2</sup> A. Glenn Mower Jr. notes the threat that population growth poses to the type of economic and social development called for by the Convention.<sup>3</sup> In searching for a solution, Mower focuses largely on the Convention's call for increasing education rates and the probable decline in fertility that will result.<sup>4</sup> He does not consider that a state's obligation to protect and provide for children<sup>5</sup> might be read to require parents to forgo procreating if they cannot meet their parental obligations—a requirement which would more directly affect population growth and development.<sup>6</sup> Eugeen Verhellen discusses in depth current strategies to implement the Convention.<sup>7</sup>

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2. See generally Thomas Hammarberg, *The U.N. Convention on the Rights of the Child – and How to Make it Work*, 12 HUM. RTS. Q. 97 (1990).

3. See A. GLENN MOWER, JR., *THE CONVENTION ON THE RIGHTS OF THE CHILD* 7 (2007) (arguing that a “positive correlation” exists between education, population control).

4. *Id.*

5. For the limited purposes of this article I will assume that the CRC is not a self-executing treaty and that states will have to implement it via domestic legislation. See *infra* Part II.A (discussing the triangular relationship between children, their parents, and the state).

6. See *infra* Part II.B.4 (examining the nature and effects of Chinese family planning processes).

7. See EUGEN VERHELLEN, *CONVENTION ON THE RIGHTS OF THE CHILD* 30-

None involve an application of the Convention's standards that is based on the moral and legal relationship between prospective parents and their future children.

It is not a new notion that prospective parents might have concrete moral obligations to their prospective children. As discussed in Part I.B, various ethicists have made such a claim. David Archard, following in the tradition of Joel Feinberg and what he called every child's right to an "open future,"<sup>8</sup> has even taken the argument so far as to use the CRC's standards as a threshold that prospective parents should meet before having their children:

[T]he minimum threshold entitlement of any child is the secure enjoyment of a good number of those rights that are listed in the United Nations Convention on the Rights of the Child. This is every child's birthright. A parent does wrong in knowingly bringing into existence a child who will not enjoy most of these rights. Acting in this wrongful way she does not exercise a procreative liberty right since that right is internally constrained by the obligation to ensure that any child will be guaranteed at the least the adequate life which these rights circumscribe.<sup>9</sup>

Archard is, however, primarily focused on the ethics and morality of such a threshold and therefore does not discuss the content of the Convention.<sup>10</sup> Similarly, Archard does not consider whether the Convention might alter our legal obligations in having children.<sup>11</sup>

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36 (2d ed. 1997) (identifying "child-advocacy," the study of the child, children's self-organization, and the development of networks as four key strategies of the children's rights movement).

8. See JOEL FEINBERG, *THE RIGHTS OF ANIMALS AND UNBORN GENERATIONS*, IN *PHILOSOPHICAL AND ENVIRONMENTAL CRISIS* (1974), *reprinted in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 67, 179 (1980) (quoting Coke as stating that "[t]he law in many cases hath consideration of him in respect of the apparent expectation of his birth"). Feinberg went on to ask, "Why then deny that the human beings of the future have rights which can be claimed against us now in their behalf?" *Id.* at 181; see also Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299 (2008) (using Feinberg's right to an "open future" to justify tort liability in the context of assisted reproductive technologies).

9. David Archard, *Wrongful Life*, 79 PHIL. 403, 420 (2004).

10. See *id.* at 406 (briefly noting that the CRC establishes a "useful" but not exhaustive list of rights to which children are entitled).

11. See generally *id.* (presenting a purely normative, and not legal, argument).

Regardless, his point raises the question of whether states parties can ever comply with their treaty obligations without considering the legal interests of future children, and their relation to the procreative rights of their prospective parents. Indeed, I argue that the Convention begins to look absurd if we do not read it as limiting the right to procreate.

Today, millions of children are born into conditions that do not meet the CRC's objective standards. According to Japp Doek, former Chairperson of the United Nations Committee on the Rights of the Child, "the world is not yet a place fit for far too many children."<sup>12</sup> The CRC, in part, calls for a world in which all children are able to exercise their rights to the highest attainable standards of health, education, and social security; to a standard of living adequate for development; to freedom from work and soldiering; and to enjoy rest, leisure, and play.<sup>13</sup> This world offers a stark contrast to the reality of many children now and in the foreseeable future:

600 million children have to live, that is to be fed, clothed, housed, and educated with less than \$1 US per day; even in the richest countries of the world one in every six children (about 47 million) live under the national poverty line; 211 million children aged 5-14 are engaged in some form of economic activity, and 186 million of them are engaged in the worst forms of child labor with the same applying for almost 60 million children age 15-17 years; about 110 million of those working children of primary education age do not receive any education at all; about 11 million children die every year of preventable diseases, that is about 20,000 per day, a fact that goes without any media attention; at the end of 2001, there were 2.7 million children under 15 years living with HIV/AIDS; in that year, 800,000 children under 15 years were newly infected with HIV and 580,000 children of that age group died of AIDS; the number of African children who had lost their mother or both parents by the end of 2000 is estimated at 12.1 million and is forecast to more than double over the next decade; . . . in the past decade two

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12. Jaap E. Doek, *The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges*, 22 ST. LOUIS U. PUB. L. REV. 235, 247 (2003).

13. See *infra* Part II.A.

million children died as a direct result of armed conflicts and an additional six million were injured or disabled.<sup>14</sup>

Much of this is addressed by the United Nations Millennium Development Goals' ("MDGs") eight benchmarks of development that target extreme poverty and illness.<sup>15</sup> But these goals cannot be ensured without attention to the very behavior that brings children into the world. Former U.N. Secretary-General Kofi Annan stated that "the Millennium Development Goals, particularly the eradication of extreme poverty and hunger, cannot be achieved if questions of population and reproductive health are not squarely addressed."<sup>16</sup> According to a recent U.N. report, "[p]opulation is at the core of development, and population trends are a key element of the context in which development takes place. Consequently, measures directed towards influencing demographic behaviour and population dynamics . . . contribute significantly to the achievement of universally agreed development goals, including [the MDGs]."<sup>17</sup>

A recent article in the *San Francisco Chronicle* covered the story of Afghanistan's unusually high fertility rate, which is the highest in Asia.<sup>18</sup> At the current rate of growth, Afghanistan's population will

14. Doek, *supra* note 12, at 247-48 (footnote omitted); *see also* Jaap E. Doek, *The U.N. Convention on the Rights of the Child: Some Observations on the Monitoring and the Social Context of Its Implementation*, 14 U. FLA. J.L. & PUB. POL'Y 125, 131-32 (2003) (observing that socioeconomic conditions prevent many children from enjoying the rights articulated in the CRC).

15. United Nations Millennium Development Goals, <http://www.un.org/millenniumgoals> (last visited Oct. 9, 2009) (listing gender equality, child and maternal health, environmental sustainability, and global partnership among the Millennium Development Goals).

16. Press Release, U.N. Econ. & Soc. Council Comm. for Asia & the Pac., Region Cannot Confront Challenges Effectively Without Addressing Population and Reproductive Health, U.N. Doc. G/40/2002 (Dec.16, 2002).

17. DEP'T OF ECON. & SOC. AFF., POPULATION CHALLENGES AND DEVELOPMENT GOALS 55 (2005); *see also* DAVID BLOOM ET AL., THE DEMOGRAPHIC DIVIDEND: A NEW PERSPECTIVE ON THE ECONOMIC CONSEQUENCES OF POPULATION CHANGE (2003) (arguing that reducing high fertility can create opportunities for economic growth when combined with specific educational, health, and labor-market policies). The demographic dividend, which is a recognized and accurate model in welfare economics, rests largely on the ratio of productive adults to dependent children, but depends on key variables such as education and public health. BLOOM ET AL., *supra*, at xiii.

18. *See* James Palmer, *Afghans Torn Over Family Size*, S.F. CHRON., Dec. 14, 2008, at A15 ("About 800,000 people annually are added to the nation's

close to double by 2050.<sup>19</sup> Research attributes Afghanistan's rampant poverty (forty-two percent of Afghans live below the poverty line) and high infant mortality rates largely to these high fertility rates.<sup>20</sup> Moreover many of the Afghans interviewed will continue to have as many children as possible, primarily because they are needed for labor, but also because "[m]ost of the people here believe the number of children they have is dependent on God's will."<sup>21</sup>

Afghanistan ratified the CRC in 1994.<sup>22</sup> Here, then, is the embodiment of Archard's dilemma: Are States Parties, like Afghanistan, obligated under the CRC to alter their citizens' perception of the duties they owe their prospective children when choosing to procreate?

This article examines the CRC to determine whether it provides a *reason* for states to pursue policies that alter prospective parents' perceptions of the duties they owe their prospective children—a reason states may be legally bound to confront. Part II introduces a new framework for interpreting the CRC that takes a child-centered perspective, but one with a specific focus on the value of potentiality and on the interests of prospective children. Part III then interprets the Convention in light of this framework to see whether it places legal obligations on prospective parents. Finally, Part IV takes up possible counterarguments to the claim that the CRC can limit a prospective parent's right to procreate.

If placing duties on prospective parents seems odd, it should be remembered that children's rights were once themselves an oddity. John Eekelaar finds that children's interests' trumping their parents' interests represents a "total reversal" from a history in which children's interests were made subservient to those of adults.<sup>23</sup> If we have yet to elevate prospective children's rights over those of would-

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population . . .").

19. *Id.*

20. *Id.* (remarking that Afghanistan's infant mortality rate is 123 times that of the United States).

21. *Id.*

22. The Secretary-General, CRC: Afghanistan: Notification, C.N.322.1995.TREATIES-7 (*Depositary Notification*) (Nov. 7, 2002), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec).

23. John Eekelaar, *The Emergence of Children's Rights*, 6 OXFORD J. LEGAL STUD. 161, 172 (1986).

be parents, it may not be for any truly principled reasons. Given how small the number of existing children is relative to the number of future children, reading the CRC to ignore those future children is regressive, almost myopically static, and as described at length below, contrary to a true child-centered perspective.<sup>24</sup> As Laura Purdy said, “It is unreasonable, in a world of limited resources and great need, to be required to allocate resources for those who didn’t have to need them.”<sup>25</sup>

## I. A NEW FRAMEWORK

### A. A CHILD-CENTERED PERSPECTIVE THAT ALSO ACCOUNTS FOR A CHILD’S POTENTIALITY

To consider the CRC as an instrument which places duties on prospective parents, we must assess it from a new and unique perspective. As an initial matter, a child-centered perspective (or what Barbara Bennett Woodhouse calls a “generist perspective”),<sup>26</sup> does *not* simply apply an adult’s self-referential “best interest” standard, *nor* does it treat the child as an autonomous rights-holder.<sup>27</sup> Rather, it views children as normatively drawing forth, impelling only love and nurturing from all who deal with them. This is a meaningful standard that might call into question the propriety of creating children to serve as laborers, for example. It would require us, among other things, to forgo having children until we are in a position to care for them, despite our yearning to do so sooner. It

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24. *Infra* Part I.A.

25. Laura M. Purdy, *Loving Future People*, in REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 300, 313 (1995). Justice Oliver Wendell Holmes said this: “We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.” Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 474 (1897). The Convention calls upon all citizens of the States Parties to provide their resources and thus give up certain things to help fund the changes children deserve as their birthright. All have to forgo fulfilling certain interests to achieve the Convention’s goals. Are prospective parents among those to whom this applies? Once children have arrived in this world neither the parent nor the state can simply create a better life for the child than actual conditions permit.

26. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1755 (1993).

27. See *id.* at 1755-57 (describing the generist perspective as a means to assist adults in making more legitimate decisions with respect to children).



rejects the older and competing perspective that by creating children we have benefited them enough.

This perspective is consistent with accepted methods of reading the CRC. The Vienna Convention on the Law of Treaties, which the Committee on the Rights of the Child (the “Committee”) has used as a guide in interpreting the CRC,<sup>28</sup> states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>29</sup> The Committee’s General Comment Number Five further lays out guiding principles for interpreting the CRC.<sup>30</sup> These include Article 3(1)’s best interests of the child standard,<sup>31</sup> as well as Article 6’s state party obligation to “ensure to the maximum extent possible the survival and development of the child.”<sup>32</sup>

The generist perspective is consistent with the CRC obligation to ensure the best interests of the child, prioritizing his or her interests over those of adults. The perspective mirrors the CRC obligation to maximize childrens’ survival and development, that is, to make choices which produce the best outcome for childrens’ well-being. Consistent with these principles, the perspective entails reading the CRC to require policy shifts that result in the actual realization of childrens’ rights. It requires states to make interpretive and therefore policy decisions based on maximizing outcomes that are in children’s best interests. From this perspective, the end goal of the CRC is to prevent children from living in certain conditions or below

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28. See General Comment No. 5, General Measures of Implementation for the Convention on the Rights of the Child, Committee on the Rights of the Child, ¶ 14, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter General Comment No. 5] (using the definitions and various requirements under the Vienna Convention, *infra* note 29, as a guide in interpreting the CRC).

29. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

30. See General Comment No. 5, *supra* note 28, ¶ 12 (recognizing within Articles 2, 3(1), 6, and 12 of the CRC general principles to guide governments in implementing the Convention).

31. See Philip Alston, *The Legal Framework of the Convention on the Rights of the Child*, 91/2 BULL. HUM. RTS. 1, 7 (1992) (remarking that the best interest standard also appears elsewhere in the CRC, specifically with reference to separation of children from their families, childhood development, adoption, and children’s interactions with police).

32. Convention on the Rights of the Child, *supra* note 1, art. 6(2).

a minimum threshold. For example, if we can interpret the treaty in a way that prevents children from living in the absence of food, healthcare, and education, it would be inconsistent with the child-centered perspective to interpret the treaty so as to permit such circumstances to exist.

Finally, we must insert an element of time into our child-centered perspective by taking into account a child's life prospects.<sup>33</sup> This means maximizing not just the interests of a given child at a static point in time, but acting so as to maximize the child's life prospects. As children grow older, in the process of living their finite lives, they lose that potentiality. But as we move back in time in the direction of and even before their birth, their potentiality grows and with it our obligations to them because our actions become ever more influential. Children are rights-holders whose potential to enjoy those rights grows as we move in the direction of their birth and beyond.

This slightly modified perspective is also consistent with the CRC. Prior to the CRC's coming into force, children were already protected in various human rights instruments.<sup>34</sup> Arguably, the CRC was necessary because children, as a class, are uniquely vulnerable in terms of their potentiality and therefore require special protection. Children need certain rights that adults do not, in part, because deprivation threatens a child's potentiality, which it cannot do to an adult whose potentiality is more fixed. A child's entire future well-being can be determined by our behavior towards him or her.

The fluid nature of a child's potentiality is reflected in the greater emphasis that CRC jurisprudence places on younger children than on older ones, as evidenced by General Comment Number Seven, "Implementing Child Rights in Early Childhood."<sup>35</sup> Given that the

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33. I believe this would be altering Bennett Woodhouse's generist perspective. Presumably Woodhouse is referring primarily to extant children, though she also refers to John Rawls' "generational" principle of the duties we owe future generations—specifically the principle that we must leave them more than we ourselves were given. See Woodhouse, *supra* note 26, at 1755.

34. See Adam Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 251, 257 (1996) (identifying the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as the first legally binding global provisions protecting the rights of children).

35. General Comment No. 7, Implementing Child Rights in Early Childhood, Committee on the Rights of the Child, U.N. Doc. CRC/C/GC/7/Rev.1, (Sept. 20,

Committee has only issued ten General Comments since its inception, it is significant that it chose to comment on the importance of state party obligations with regard to early childhood—though this is not a specific area of focus within the CRC. The Comment states that “[e]arly childhood is a critical period for realizing children’s rights,”<sup>36</sup> based on several reasons, which can be reduced to a single claim: the circumstances of our early youth determine in large part the people we become.

#### B. THEORIES OF OBLIGATIONS TO PROSPECTIVE CHILDREN

Viewing the CRC from a child-centered perspective that accounts for potentiality pushes our focus away from adulthood back in the direction of birth. For example, it makes little sense to require secondary education to be free and compulsory, but not to require the same for primary education. Furthermore, following our purpose of promoting children’s welfare via the actual realization of their rights and the maximization of their outcomes, and taking into account their unique potentiality, we must consider how states parties and prospective parents’ decisions will affect future children.

This may be a new approach for lawyers, but it is not for ethics and morality theorists. Lawyers have tended to lag far behind philosophers in considering duties to future generations in general and prospective children in particular. This is true even among human rights lawyers, who should be more in step with moral theory, on which human rights are primarily based. Philosophers have long provided moral frameworks that are consistent with and undergird our child potentiality centered perspective. Indeed, much of this discourse occurred in the 1960s and 1970s, when overpopulation made the rights and wrongs of having children a central policy concern.

For example, Onora O’Neill has argued,

the right to beget or bear is not unrestricted, but contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others. Persons who beget or bear without making any such plans cannot claim that they are exercising a right.

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2006) [hereinafter General Comment No. 7].

36. *Id.* ¶ 6.

A corollary of this claim is that some coercive population control policies do not usually violate persons' rights to procreate . . . .<sup>37</sup>

In the same piece, she referred to “a minimally adequate quality or standard of life” as the content of adequately rearing one’s children, and said that “[a] justifiable procreation decision must be one which is based on a feasible plan for any child which is born to have at least a minimally adequate standard of upbringing, however this is specified.”<sup>38</sup> Not inconsistently, she now argues against attributing fundamental moral rights to children, tending instead to favor fundamental obligations on adults,<sup>39</sup> though she finds talk of children’s rights politically and instrumentally valuable in creating parental obligations.<sup>40</sup>

O’Neill’s earlier work was not unique in suggesting that we have duties to our prospective children. Michael Bayles, a contemporary, argued that, “[t]here is good reason for legislation to prevent the birth of persons who would lack substantial capacity to achieve or take advantage of a quality of life of level *n* or whose existence would decrease the number of people who might live with a quality of life at that level.”<sup>41</sup> Bayles went on to talk about a possible index for the quality of life, but he did not lay out any specific standards.<sup>42</sup> Later, Archard—as indicated in his reference to the CRC above<sup>43</sup>—writing years after O’Neill and Bayles, goes further toward filling in actual content, norms, or standards for the duty.

Bonnie Steinbock offers what she calls a “holistic” view of the right to procreate, grounded in moral theory and international human rights instruments, and argues that “[t]he right to reproduce protects

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37. Onora O’Neill, *Begetting, Bearing, and Rearing*, in *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* 25, 25-26 (Onora O’Neill & William Ruddick eds., 1979).

38. *Id.* at 34.

39. See Onora O’Neill, *Children’s Rights and Children’s Lives*, in *CHILDREN, RIGHTS, AND THE LAW* 24, 25-26 (Phillip Alston et al. eds., 1992) (arguing that adults have an obligation not to abuse or molest children, to provide care to children, and to be “kind and considerate” toward children).

40. See *id.* at 39.

41. Michael Bayles, *Harm to the Unconceived*, 5 *PHIL. & PUB. AFF.* 292, 302 (1976).

42. *Id.* at 301.

43. See Archard, *supra* note 9.

the interests individuals have in founding families. If this is the correct conception of the right to reproduce, then where there is no intention or ability to rear, there is no right to reproduce.”<sup>44</sup> As such, “[t]here is no unlimited right to produce children whom one will beat or starve or kill.”<sup>45</sup> Steinbock’s conception of the right also restricts prospective parents’ use of the class of prospective children, limiting their power to determine the fate of members of the class by creating a minimum threshold before one is permitted access.

Some legal philosophers have made similar arguments, though it seems they have not gone much further than Archard in defining this duty. For example, Francis Kamm made the following point, albeit in the context of human cloning:

I suggest that we might wrong people even if we create them to lives worth living according to this reasoning: (a) no one is harmed in not being created, because there is no one to be harmed if we do not create someone; hence, (b) we can set a high standard for permissibly creating people, demanding that creators create lives that are more than minimally satisfactory; and (c) if new people have a right to this, then we could violate their rights by creating them without meeting this standard; one way to avoid the violation is by not creating them.<sup>46</sup>

In the context of assisted reproductive technologies, various legal arguments have been made for a “minimum threshold” of quality of life that must be met before we create a child. These include Ronald M. Green’s argument that the standard should be to ensure that children born are in parity with those in the child’s “birth cohort.”<sup>47</sup>

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44. See Bonnie Steinbock, *Rethinking the Right to Reproduce* 23 (Harvard Ctr. for Population & Dev. Studies, Working Paper No. 98.05, 1998), available at [http://search.sph.harvard.edu/search?ie=&site=HSPH\\_Homepage&output=xml\\_no\\_dtd&client=HSPH\\_Homepage&lr=&proxystylesheet=HSPH\\_Homepage&oe=&q=steinbock&sa.x=7&sa.y=10&sa=Google+Search](http://search.sph.harvard.edu/search?ie=&site=HSPH_Homepage&output=xml_no_dtd&client=HSPH_Homepage&lr=&proxystylesheet=HSPH_Homepage&oe=&q=steinbock&sa.x=7&sa.y=10&sa=Google+Search) (follow “Working Paper Series” link) (rejecting a view of the right to reproduce that stems from purely biological considerations).

45. *Id.* at 25.

46. Francis M. Kamm, *Cloning and Harm to Offspring*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 65, 72 (2000) (footnote omitted).

47. See Ronald M. Green, *Parental Autonomy and the Obligation not to Harm One’s Child Genetically*, 25 J.L. MED. & ETHICS 5, 10 (1997); see also Carl H. Coleman, *Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies*, 50 UCLA L. REV. 17, 53 (2002) (citing Green for the same

Richard Storrow also argues that prospective fertility-treatment patients should be screened for fitness, i.e. for “competency to perform parental duties adequately.”<sup>48</sup>

Further, in the context of nonconsensual reproduction, legal arguments have been made for the rights that could be afforded to the class of prospective children. Michael Goodhart has argued that children born of war rape and forced impregnation can and should be viewed as having had their human rights violated by their rapist-fathers—that is, that they can meaningfully assert a claim of wrongful procreation against them.<sup>49</sup>

A full exploration of the morality of procreating is beyond this article (and perhaps the capacity of the author), but I think it is safe at this point to claim that there is a theoretical basis in morality, and an evolving one in law, for holding prospective parents to obligations vis-à-vis their prospective children. The obvious question then is whether, as Achard suggests, the Convention might provide the content, norms, or standards for those obligations.

Significantly, while it is theoretically possible to hold prospective parents to obligations vis-à-vis their prospective children, at least two strong moral counter-arguments should be noted. The first is based on an adaptation of Derek Parfit’s non-identity problem, which states that we cannot harm people in the act of creating them unless their lives are not worth living.<sup>50</sup> The second is Laura Shanner’s argument that prospective children cannot assert a claim not to exist.<sup>51</sup>

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proposition).

48. Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Fertility Clinics*, 28 CARDOZO L. REV. 2283, 2304 (2007).

49. See Michael Goodhart, *Sins of the Fathers: War Rape, Wrongful Procreation, and Children's Human Rights*, 6 J. HUM. RTS. 307, 309-310 (2007) (noting that it is necessary to give children born of war rape and forced impregnation their own rights in order to ensure that the focus is not only on the mothers as rape victims, but also on the children).

50. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 76 (1994) (citing Derek Parfit, *On Doing the Best for Our Children*, in ETHICS AND POPULATION (Michael D. Bayles ed. 1976). Parfit argues that a particular child born with a handicap is not harmed merely by being born to a mother who knew ahead of time that that child had no chance of being normal. See Robertson, *supra*, at 76.

51. See Laura Shanner, *The Right to Procreate: When Rights Claims Have Gone Wrong*, 40 MCGILL L.J. 823, 844 (1995).

Archard, O'Neill, Bayles, and Kamm address these types of arguments in formulating their claims above. Others take less deontological and more consequentialist or utilitarian approaches to overcome these counter-arguments.<sup>52</sup> Parfit tended towards the "no difference" view that procreating a child into harmful circumstances is no different from inflicting harmful circumstances on a child who is already alive.<sup>53</sup>

We can answer the first counterargument by saying that we do not run afoul of the non-identity problem if the obligation of parents to children is beneficence (as some of the theorists discussed above suggest and as I will argue below), as opposed to the obligation not to harm. For, even if we normally cannot harm a person in the act of creating them, we can certainly fail to be beneficent in doing so. As to the second counterargument, Bayles deals effectively with Shanner's point that a non-entity cannot claim non-existence by treating prospective children not as individuals but as a class of persons:

Liberty-limiting laws which protect the well-being of unconceived persons must be supported by a principle other than that of private harm. In general, the conditions for the application of the harm principle are not met in situations involving the well-being of the unconceived. First, the condition of an individual person is in fact met only after conception brings about the person's existence. Second, even when the condition of an individual person is met, in important cases that person is not harmed. Consequently, an acceptable principle must involve (1) classes of persons

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52. See generally TIM MULGAN, *FUTURE PEOPLE: A MODEST CONSEQUENTIALIST ACCOUNT OF OUR OBLIGATIONS TO FUTURE GENERATIONS* 9, 13, 16-17 (2006). Mulgan describes various approaches to determining the morality of creating others, including consequentialist and Kantian, and person-affecting approaches. Person-affecting approaches typically define harm by comparing possible outcomes of a person's actions to a particular baseline; consider wronging someone to be separate from harming them; treat prospective children as part of a class; or base the desirability of various outcomes on harm to persons other than the prospective child. *Id.*

53. See Dan W. Brock, *Procreative Liberty*, 74 TEX. L. REV. 187, 203 (1995) (book review); see also MULGAN, *supra* note 52, at 20-21 (explaining Parfit's "no difference" principle and contrasting it with the person-affecting principle, which contemplates a difference between the wrongs committed).

rather than individual ones and (2) choices between good or positive qualities of life.<sup>54</sup>

Again, this approach is entirely consistent with the CRC because the CRC also treats children as a class of persons.<sup>55</sup> The CRC guarantees an individual child health care and education not because of who he is, but because he is part of a larger class of persons called children. In one sense, the CRC does nothing more than designate children as a protected class and specifies the minimum conditions in which they should live.

#### C. ARTICULATING A PRINCIPLE OF PROSPECTIVE PARENTAL OBLIGATION

When looking for the actual standards in the CRC that might define or provide content for the minimum quality of life owed to children, we can focus on only those rights that we can reasonably assume will affect the vast majority of children. For example, children have a CRC right to procedural due process,<sup>56</sup> but there is no guarantee that a child will come into contact with the judicial system. In contrast, the right to “the highest attainable standard of health,” or the right to a “standard of living adequate for the child’s . . . development” foreseeably affects most extant and future children.<sup>57</sup> Therefore, for purposes of this article, I will focus on what Eekelaar calls “basic” interests (general physical, emotional, and intellectual care) and “developmental” interests (ensuring the development of the child’s capacities to the best advantage),<sup>58</sup> or what Hammarberg calls “provision” (“the right to get one’s basic needs fulfilled—for

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54. Bayles, *supra* note 41, at 300.

55. See Convention on the Rights of the Child, *supra* note 1, art. 1 (“[C]hild means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”); *accord* General Comment No. 7, *supra* note 35, ¶ 13(b). The title of the comment’s section is “Best interests of young children *as a group or constituency*.” *Id.* (emphasis added). In contrast, the section directly before refers to “Best interests of individual children.” *Id.* ¶ 13(a). It speaks in terms of “decision-making” by those responsible for children and states’ obligations regarding legal proceedings; the latter section, using the language of “group or constituency,” refers to “All law and policy development[s] . . . that affect children.” *Id.* ¶¶ 13(a)-(b).

56. Convention on the Rights of the Child, *supra* note 1, art. 40.

57. *Id.* arts. 24, 27.

58. Eekelaar, *supra* note 23, at 170.



example, the rights to food, health care, education, recreation and play”),<sup>59</sup> rather than “autonomy” interests (the right to due process, for example).<sup>60</sup>

Of course, many of the basic and developmental rights are subject to the express qualification that they be fulfilled within the means of the prospective parents or state party.<sup>61</sup> Regardless, the question remains as to what prospective parents and the state are obligated to do when neither can assure prospective children their basic and developmental CRC rights.<sup>62</sup> Are these standards primarily aspirational, or are they actual binding norms on states parties? What, if anything, does the implementation of these rights mean for prospective parents’ procreative rights?

Recall that the deprivation (or, more accurately, violation) of children’s rights is a given today. The Committee has stated:

Young children are entitled to a standard of living adequate for their physical, mental, spiritual, moral and social development (art. 27). The Committee notes with concern that even the most basic standard of living is not assured for millions of young children, despite widespread recognition of the adverse consequences of deprivation.<sup>63</sup>

Clearly, a state violates children’s rights by not providing adequate resources. But could not, or should not, a state also prevent deprivation through policies that directly address population growth? And, do not children’s basic and developmental rights also create legal duties on prospective parents? Does a state violate the CRC by providing incentives, however subtle, for prospective parents to have children where those children will be born in circumstances below the CRC threshold?

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59. Hammarberg, *supra* note 2, at 100.

60. See Eekelaar, *supra* note 23, at 170-71. These categories of basic needs overlap. See *id.* (elevating basic and developmental interests above autonomy interests).

61. See Convention on the Rights of the Child, *supra* note 1, art. 27.

62. See *id.* arts. 24, 26- 29, 31 (guaranteeing various rights to children without also outlining express mechanisms for the provision of those rights, or remedies where those rights cannot be provided by parents or states).

63. General Comment No. 7, *supra* note 35, ¶ 26.

Using the CRC's standards, we can easily construct legal principles of prospective parental obligation from deontological, consequentialist, and justice perspectives. With regard to the deontological, we should first note that rights that protecting a certain class's interests will often conflict with other classes' rights.<sup>64</sup> It follows that parents' and children's rights will sometimes diverge from one another.<sup>65</sup> As with many human rights, there is always "the common problem of resolving conflicts between *rights* (such as rights to speech and to privacy, as accommodated in the law of defamation) that also may lead to a 'limitation,' in this case of one right to give space to the other."<sup>66</sup> In general, the act of balancing rights via correlative duties is consistent with the Convention.<sup>67</sup>

Deontologically speaking, the CRC endows prospective children with positive claim-rights that exert correlative duties on parents. These duties, in turn, conflict with and therefore limit, prospective parents' negative liberty-rights to procreate. For example, a prospective parent who wishes to have a large family may have a right to procreate, but that right will be limited by the correlative duty she owes to her prospective children not to bring them into sub-standard, rights-violating conditions.

We can also discuss the principle from a more consequentialist perspective, taking account of the value of the rights the CRC guarantees.<sup>68</sup> States parties must expend resources to comply with the CRC and they must divide these limited resources among the children in need. Therefore, states can increase compliance with the CRC by either finding more resources (including those obtainable through international cooperation), or reducing the number of children for whom they must provide. To the extent that states are

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64. See Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 503-06 (1989).

65. Hammarberg, *supra* note 2, at 100.

66. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 154 (3d ed. 2008).

67. See Convention on the Rights of the Child, *supra* note 1, art. 3(2) (directing states to consider the duties of a child's "parents, legal guardians, or other individuals legally responsible" for the child when determining how best to effectuate the rights guaranteed in the Convention).

68. See Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1038-40 (1996) (noting Sen's compromise between utilitarian goal-based and libertarian rights-based analyses). Sen suggests that rights, themselves, are akin to goals, thus endowing rights with intrinsic utilitarian value. *Id.*

unable to increase resources, they can urge prospective parents to forgo procreating, in a way that ensures the maximum number of children are enjoying their basic and developmental rights.<sup>69</sup> If they do not, and thereby permit children to be born into rights-depriving conditions, states parties will fail to comply with the CRC.

Finally, we can discuss the principle from a justice perspective. John Rawls's "generational" principle holds that we must leave future generations more than we ourselves were given.<sup>70</sup> Lukas Meyer, in his piece *Intergenerational Justice*, also presents various norms in arguing that, regardless of which we choose, "[c]onsiderations based upon the rights of future people can guide prospective parents in deciding whether they should revise their decision to conceive out of regard for the children they would otherwise have."<sup>71</sup> If the CRC delineates those circumstances in which it is just or unjust to procreate, it might also preemptively enjoin a prospective parent from acting unjustly and prohibit him or her from having a child under certain circumstances.

Yael Aridor Bar-Ilan has systematically examined the issue of ex ante versus ex post justice (i.e., whether to ban torture ex ante, or to decide whether particular instances of torture were unjust ex post).<sup>72</sup> He suggests that any ex post exception to an ex ante rule should be conditioned on "the ability to universalize the decision to other future cases."<sup>73</sup> If the CRC holds that it is unjust for children to live in

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69. I do not want to enter a full-scale utilitarian discussion of how to read the CRC, but I assume that the argument here is based on rule-maximizing the average welfare of children in a given state, as opposed to maximizing total welfare. See Jesper Ryberg et al., *The Repugnant Conclusion* § 2.1, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2006), <http://plato.stanford.edu/entries/repugnant-conclusion/> (last visited Feb. 9, 2010) (remarking that although a rule centered on maximizing average welfare and another rule centered on maximizing total welfare dictate "the same moral ranking" when comparing populations of the same size, those moral rankings will change when comparing populations of different sizes).

70. Woodhouse, *supra* note 26, at 1755 (citing JOHN RAWLS, A THEORY OF JUSTICE 284-93 (1971)).

71. Lukas Meyer, *Intergenerational Justice* § 3.2, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/entries/justice-intergenerational/> (last visited Feb. 9, 2010).

72. See Yael Aridor Bar-Ilan, *Justice: When Do We Decide?*, 39 CONN. L. REV. 923, 926 (2007) (observing that debate between ex ante and ex post is applicable to many areas of law in addition to torture, such as contracts and civil procedure).

73. *Id.* at 970.

certain conditions but we read it to permit only remedial action ex post a child's birth (for example, inviting aid organizations to provide neo-natal medical services amidst a fertility rate spike), then we violate Bar-Ilan's rule. We would have employed exclusively ex post reasoning by not also considering that the state should have acted to reduce fertility rates. Even if interpreting the CRC to permit only ex post action is an exception to a general ex ante rule, it might also fail Bar-Ilan's test because the exception—allowing children to be born absent adequate conditions—cannot be universalized without ignoring CRC rights.

Finally, aside from the deontological, consequentialist, and justice perspectives, the principle that the CRC imposes obligations on prospective parents has ramifications for the right to procreate. Prospective parents determine the conditions into which their future children are born, and at least the initial conditions in which those children will live. Moreover, it may be that these conditions do not meet and are therefore in conflict with the conditions required by the CRC. When this conflict arises, what are member states, as the final obligors under the Convention,<sup>74</sup> to do? Are they to wait for each child to be born in sub-CRC conditions, and then rush to change those conditions? In failing to take preventive action, states are essentially ignoring a foreseen series of events that will cause a massive influx of refugees—refugees whom the law protects but for whom resources are lacking.

Future children's welfare hinges on the decisions prospective parents in each member state make. This is true with regard to both the timing and number of children prospective parents choose to have. A parent may choose to have a child in a situation where it is virtually assured that the child will live in violation of the Convention's minimum standards; a parent may have five children when sufficient resources exist to ensure the sufficient welfare of only one or two. We cannot take the Convention seriously while also holding that it should exert no influence on prospective parents' procreative decisions.

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74. See General Comment No. 5, *supra* note 28, ¶ 41 ("The Committee reiterates that in all circumstances, the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the Convention throughout the [territories under its] jurisdiction.").

With all of this in mind, we can employ our new framework. Using a child-centered perspective that accounts for potentiality and that places obligations on prospective parents, we can attempt to read the CRC as limiting prospective parents' rights to procreate if their children would be deprived of the basic and developmental rights that the CRC guarantees.

## II. REREADING THE CONVENTION

### A. DUTIES ON PARENTS GENERALLY

Perhaps the first question to answer when looking at the CRC in light of this framework is whether the CRC places any duties on parents with regard to the children they already have. This may seem simple enough, but in domestic regimes the triangular relations of child, parent, and state are often confusing, and interposing an international treaty regime and treaty-body only makes matters more complex.

It seems that as a general matter the CRC does create positive and negative rights that parents have the "primary responsibility" to fulfill and to respect; although the state is the secondary obligor with regard to all CRC rights.<sup>75</sup> That is, the CRC obligates states to fulfill the children's rights if the parents do not. "The CRC fully recognizes, in very explicit terms not found in any other human rights treaty, that parents have the primary responsibility for the upbringing and development of their child," but states parties are simultaneously obligated to assist parents in meeting those obligations.<sup>76</sup> The state must intervene where the parents fail to uphold their duties,<sup>77</sup> and shall also take action to secure "maintenance for the child from the parents."<sup>78</sup> Note that this final obligation, found in Article 27(4), applies whether or not the parent has custody of the child.<sup>79</sup> Parents, having created the child, can be

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75. Jaap E. Doek, *The Eighteenth Birthday of Convention of the Rights of the Child: Achievements and Challenges*, 41 U. MICH. J.L. REFORM 61, 63 (2007).

76. *Id.* (concluding that the state does not infringe on parental rights by undertaking the obligation to provide for and protect children where parents cannot, but rather acts in partnership with parents).

77. GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 72 (1995).

78. Convention on the Rights of the Child, *supra* note 1, art. 27(4).

79. *Id.*

obligated by the state to provide support whether or not they enjoy the reciprocal benefit of the child's company.

Given the triangular relationship between state, parent, and child, it seems reasonable that a state could implement the CRC through legislation that provides disincentives to procreate when prospective parents would foreseeably fail their primary duty, while simultaneously materially assisting the prospective parents to improve conditions, so that at some future time, their child would not be deprived of his or her rights. This process would not be entirely distinct from the procedure some U.S. courts have outlined for "no procreation" orders. Such orders are issued when prospective parents are deemed unfit to parent based on recidivist child abuse and neglect,<sup>80</sup> and are converted to "no custody" orders under which the state takes custody in the event the parent has a child.

But while the CRC may impose duties on parents, the chief question remains as to whether it can also impose duties on prospective parents. That answer will turn on whether we can read the CRC as protecting future or prospective children.

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80. See, e.g., *In re V.R.*, 6 Misc. 3d 1003(A), 2004 WL 3029874 (N.Y. Fam. Ct. 2004). There the court said:

The court offers these factors as a 4-prong test narrowly tailored to meet the "strict scrutiny test" for impinging on constitutional rights . . . (1) a neglect case is pending against the parent involving the removal of a child; and (2) the parent has previously had one or more children placed in foster care, voluntarily or involuntarily, or placed with a relative resource or similar individual as an alternative to foster care under the supervision of the Department; and (3) the parent has demonstrated that he or she will not or cannot for the reasonably foreseeable future have the capacity to physically take care of the activities of daily living of a child at issue in the neglect case, *i.e.*, providing food, clothing, shelter, health needs, education needs, etc; and (4) the parent has demonstrated that he or she will not or cannot reasonably for the foreseeable future provide for the child's needs financially, by any legitimate means (including welfare, temporary assistance, disability payments, unemployment, wages, wages of a spouse or partner, etc.).

*Id.* at \*8.

## B. DUTIES TO PROSPECTIVE CHILDREN

1. *The Preamble*

For our purposes, and keeping in mind the Vienna Convention's "ordinary meaning" standard,<sup>81</sup> the most interesting language is in the CRC's Preamble and first definitional provision. Together, these ask states parties to bear in mind that "the child . . . needs special safeguards and care, including appropriate legal protection, before as well as after birth,"<sup>82</sup> and define a child as "every human being below the age of eighteen years."<sup>83</sup>

Both scholars and courts are split over whether the two provisions, taken together, apply the CRC's protections to fetuses. Some find unequivocally that, at least with regard to the Article 6 guarantee of a right to life, the CRC does not interfere with a woman's right to an abortion: "[a]t most, this language recognises a state's duty to promote a child's capacity to survive and thrive after birth, by targeting the pregnant woman's nutrition and health."<sup>84</sup> Others find the opposite:

CRC provisions may be interpreted as recognizing a fetus as a child in need of protection. . . . [T]he CRC does not establish when childhood begins. Although an individual eighteen years or older is not a 'child' under the CRC, the CRC does not set a floor at which childhood starts.<sup>85</sup>

Interestingly, the Committee, referring to discrimination against girl children, noted that among other objectionable practices, "[t]hey may be the victims of selective abortion."<sup>86</sup> This could certainly

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81. Vienna Convention on the Law of Treaties, *supra* note 29, art. 31.

82. Convention on the Rights of the Child, *supra* note 1, pmbl.

83. *Id.* art. 1.

84. Christina Zampas & Jaime M. Gher, *Abortion as a Human Right – International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 263 (2008).

85. Laine Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for the United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 186 (2006); *see also* Abby F. Janoff, *Rights of the Pregnant Child v. Rights of the Unborn Under the Convention on the Rights of the Child*, 22 B.U. INT'L L.J. 163, 166 (2004) ("The plain meaning of the Convention's terms does not clarify whether the Convention provisions apply to 'child' before birth.").

86. General Comment No. 7, *supra* note 35, ¶ 11(b)(i).

suggest that the Committee considers the CRC as applying before birth. Alternatively, the Committee could instead be concerned about the broader effects of selective abortion on women as a class of persons, or that such selection will cause disastrous gender imbalances in the future population, rather than focusing on any putative harm to fetuses.

Courts in Australia have found both that the CRC does not apply to unborn children<sup>87</sup> and that it should not be interpreted so narrowly as to only apply to a “living child.”<sup>88</sup> The Convention’s *travaux préparatoires* do not clarify the matter. This might suggest that some delegations in the drafting process did think that there would first have to be conception before the CRC’s protections could engage.<sup>89</sup> At the same time, some other delegations thought it could apply to prospective children, with some drafters finding that “before birth” could refer to domestic legislation protecting the inheritance rights of future children.<sup>90</sup> Still others thought that the Preamble’s language could be interpreted more broadly to refer to more than the abortion issue.<sup>91</sup>

I would argue instead that our framework allows us to evade the entire abortion debate, and to make perfect sense of the provisions, as well as the *travaux préparatoires*. Under our framework, the Preamble and Article 1’s definition of a “child” encompass both extant and prospective children, as opposed to prospective abortees, with the result that prospective parents are under a duty to act so that *any child born* is not deprived of his or her Convention rights.

It is not clear that any class of future persons (including prospective children) also includes fetuses, if and when they are

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87. See *Ly v. Minister for Immigration* (2000) 2000 A.A.T.A. 339, 2000 WL 1242339, ¶ 73 (finding that although the Preamble of the CRC appears to acknowledge unborn children, the CRC would “need to give specific or implied recognition to unborn children in specific circumstances” in order to lend credence to the argument that it extends to the unborn).

88. *Griffiths v. Minister for Immigration* (2003) 176 F.L.R. 272, ¶ 90, 2003 WL 21485908, ¶ 90, *rev’d on other grounds*, (2004) 2004 WL 288549 (appealing to “natural justice” in determining the scope of CRC).

89. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “*TRAVAUX PRÉPARATOIRES*” 102 (Sharon Detrick ed., 1992) [hereinafter *GUIDE TO THE “TRAVAUX PRÉPARATOIRES”*].

90. *Id.*

91. See *id.* at 109.



simultaneously considered as prospective abortees; these fetuses then lack the necessary condition that they will exist in the future. The whole question of aborting the fetus cuts off the presumption that allows one to consider the future person it would otherwise become. In contrast to determining whether a person can or will exist in a particular state of affairs that may or may not be sufficient under the standards of the CRC, abortion entirely negates the future state of affairs that the fetus would have otherwise had. Unless one can establish the legal personhood of the fetus itself, it is difficult to argue that the CRC applies because there will be no future child with an actual life to which the CRC could apply. It seems entirely inconsistent with the CRC to argue that we are concerned for the fetus's future life *per se*, that is, the value of its life irrespective of the context in which he or she lives. If life *per se* were enough for children, and no minimum threshold quality of life were required, the CRC would not exist.

Keep in mind that, while the Preamble is not itself a binding provision, it can be used in the interpretation of the treaty,<sup>92</sup> and that states have broad discretion to enlarge the protections provided, as opposed to narrowing them.<sup>93</sup> Reading the CRC in light of our framework—a child-centered perspective coupled with an appreciation for protecting the potentiality of the prospective child, as opposed to the potentiality of a prospective abortee whom the parents *do not wish to bear*—forces us to consider the Preamble and Article 1 so as to maximize the protection of prospective children at the highest point of potentiality. In contrast, reading the provisions as prohibiting abortion ensures that children will be born unwanted by their parents, and potentially in conditions that fall below the CRC's threshold standards. Finally, reading the Preamble as a nullity would be odd, especially in light of the references in the *travaux préparatoires*.

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92. See Vienna Convention on the Law of Treaties, *supra* note 29, art. 31 (instructing states parties to interpret treaties in good faith and in the context of the preamble and annexes); see also SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 56 (1999) (examining arguments that relying on a preamble, standing alone, could result in erroneous treaty interpretation).

93. See VAN BUEREN, *supra* note 77, at 34-35 (asserting that states parties to the CRC should determine “the beginning of childhood . . . by [their] own domestic legislation”).

Of course, all of this analysis smacks of a rather artificial and unnecessary focus on the ontology of the supposed rights-holder, the prospective child. We need not take such a focus to protect children, but can turn our attention instead to the duties of the prospective parent, while still maintaining an appreciation for protecting the prospective child's potentiality.

## 2. Adoption in a child's best interests

Article 21, dealing with adoption, mandates that states parties "shall ensure that the best interests of the child shall be the paramount consideration."<sup>94</sup> This provision, with the state obligation in Article 21(a) to oversee the process and the general obligation to consider the child's best interests in all state actions,<sup>95</sup> suggests that states parties cannot permit adoptions unless the children will be made better off as a result. In other words, these provisions suggest that the adoption must be a beneficent act on the part of the state. This requirement means that prospective parents must offer certain conditions, or a minimum threshold quality of life, before the state can allow them to adopt and become extant or actual parents. In effect, the state must actively forestall to ensure that prospective parents meet the needs of their prospective children.

Although adoption is not procreation, both inherently involve "the most fundamental human rights of the most helpless of humans—the rights of children to the kind of family love and care that will enable them to grow up with a decent chance of living a healthy and fulfilling life."<sup>96</sup> Thus, the fact that the CRC is so explicit about the role of the state to ensure that prospective adoptive parents can provide a minimum threshold quality of life, might suggest that the failure of the CRC to mention similar obligations with regard to procreative parents dooms my arguments. However, I would argue that there is no *meaningful* moral distinction between adoptive and

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94. Convention on the Rights of the Child, *supra* note 1, art. 21.

95. *Id.* arts. 3.1, 21(a).

96. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 151-52 (2007). "Children need loving, nurturing parents . . . [and] food and shelter and protection." *See id.* at 191. Indeed, these are the essentially the basic, developmental, and provisional interests to which I refer above. *See supra* notes 58-60 and accompanying text.

procreative parenting.<sup>97</sup> Do not the prospective children of procreative parents have rights to the kind of family love and care that will enable them to grow up with a decent chance of living a healthy and fulfilling life, such as food, shelter, and protection? Reading the CRC to make such a distinction between adoption and procreation is inconsistent with both the proposed child-centered perspective, which accounts for potentiality, and with moral theories that place obligations on prospective parents. Doing so would read the CRC as permitting (and in effect, through the tacit agreement of the influential norm-setting state, promoting) prospective parents to procreate in conditions that would deprive the children of the basic and developmental rights the CRC guarantees.

### *3. Maximizing children's interests and family planning*

Other provisions of the CRC, seen through the proposed framework, further support the claim that states can read the CRC as protecting prospective children and can implement obligations to them in their domestic legislation. Two relevant themes can be discerned in the CRC: (1) the obligation on states to *maximize* the extent to which they fulfill and respect children's rights, and (2) the much more subtle reference to the role of family planning in assuring the success of the CRC.

With regard to the first, Article 41 provides that nothing in the CRC shall affect the provisions of domestic or international law that are "more conducive to the realization of the rights of the child."<sup>98</sup> In fact, "[t]he Committee encourages all States Parties to enact and implement within their jurisdiction legal provisions that are more conducive to the realisation of the rights of the child than those contained in the Convention."<sup>99</sup> Again, per the Committee, "[w]hatever their economic circumstances, States are required to undertake all possible measures towards the realisation of the rights of the child, paying special attention to the most disadvantaged

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97. In the end, I believe that those who view the prospective children of procreation as less deserving of protection will find their argument turns on a specific view of children they may not even be aware of – the view that prospective children are property. *See infra* Part III.

98. Convention on the Rights of the Child, *supra* note 1, art. 41.

99. General Comment No. 5, *supra* note 28, ¶ 23.

groups.”<sup>100</sup> If a state can implement the CRC in a way that ensures children are not deprived of the rights the CRC guarantees them, then it must do so. It must, in all of its actions, including termination of parental rights for neglect and abuse,<sup>101</sup> consider the best interests of the child.<sup>102</sup> With regard to economic, social, and cultural rights, states parties must act to fulfill them to the “maximum extent of their available resources,”<sup>103</sup> and shall ensure “to the maximum extent possible the survival and development of the child.”<sup>104</sup>

We can couple these rather explicit references to maximization with the CRC’s more subtle reference to family planning. Article 24(2)(f) urges states parties to take appropriate measures to “develop preventative health care, guidance for parents and family planning education and services.”<sup>105</sup> During the CRC’s drafting process, some states viewed this provision as requiring the state to educate its citizens in responsible parenthood, based on not just maternal and infant health, but also on ethics and morality.<sup>106</sup> The Committee has said that “[i]t is particularly important that promotion of children’s rights should be integrated into preparation for parenthood and parenting education.”<sup>107</sup>

Article 24(2)(f) should be read here in conjunction with Article 18(2), which states that “[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities, and services for the care of children.”<sup>108</sup> If the CRC is also read as applying its protections to prospective children, this might obligate the state to provide significant family planning institutions to ensure that prospective parents can have children in states of affairs not

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100. *Id.* ¶ 8.

101. *See* Convention on the Rights of the Child, *supra* note 1, arts. 9, 20 (providing special protection for a child separated from their parents through proper judicial determination).

102. *Id.* art. 3(1).

103. *Id.* art. 4.

104. *Id.* art. 6(2).

105. *Id.* art. 24(2)(f).

106. *See* DETRICK, *supra* note 92, at 414.

107. General Comment No. 5, *supra* note 28, ¶ 54.

108. *See* Convention on the Rights of the Child, *supra* note 1, art. 18(2).

violative of CRC standards—for example, state subsidized reproductive health services to ensure that parents do not have to divide whatever resources they have among three children if they wish to only have two but lacked access to contraception to ensure that result.

Consequently, it appears that (1) states are required by the CRC to educate and guide prospective parents in promoting their children's rights and that (2) the bases for such education and guidance may include ethics and morality, which is not surprising, given that the *raison d'être* of the CRC is the promotion of what are, at their base, moral rights. Finally, (3) taking into account the principles discussed above, we know that states are explicitly obligated to *maximize* the extent to which they fulfill and respect children's rights, at least their basic and developmental rights.

Thinking in terms of our proposed framework, if as a matter of empirical fact a particular state party can *best* fulfill and ensure children's rights through ethical and moral family planning guidance, is it obligated to take that path? If a particular state party knows that, even with international cooperation, it and its relevant prospective parents have only the resources to provide for X number of children, is the state obligated to effectively guide prospective parents in making the appropriate family planning choices? Does a state party fail its obligations by not doing so?

Consider again our example case of Afghanistan.<sup>109</sup> Despite the UNPF's presence, there is staunch local opposition to family planning, a consequence of cultural norms regarding the role prospective children should play in the labor force, and of deeply held religious convictions. I suggest that the government of Afghanistan, and many states like it, face very real conflicts between ensuring CRC success through ethical and moral family planning guidance and respecting contradictory norms regarding parents' procreative freedom and their relations to their prospective children.

If the Convention represents a sea change in the international legal community's thinking about the relationship between children and adults, it has also inadvertently initiated the another sea change. Taken to their logical conclusion, the CRC's norms call for a change

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109. See *supra* text accompanying notes 18-23.

in the traditional relationship between prospective parents and their prospective children. It is a change that, in certain parts of the world especially challenged by population growth, is well under way.

#### *4. An Example: Family planning in China*

My arguments for reading the CRC as limiting the procreative rights of would-be parents may seem largely abstract, because of my reliance on moral theory and the value of potentiality. But in fact, there is precedent for such an approach, though it first began over a decade before the CRC came into force. The complex family planning regimes of the People's Republic of China ("China") cannot all be boiled down to the simplistic and monolithic "one child policy" many Western commentators understand it to be. Implemented in the largest polity in the world, they in fact parallel the proposed framework in many ways, and serve, *inter alia*, to protect the basic and developmental rights of prospective children.

As an initial matter, the common tendency in the U.S. to refer to China's planned birth policies as a monolithic and simplistic "one-child policy" is inaccurate and demonstrates the glaring disparity between U.S. perception and the reality of the China's policies. In 2007, researchers at the University of California at Irvine undertook what is perhaps the most comprehensive study of China's family planning policies to date. They found the characterization of a simplistic "one-child policy" incorrect, noting that the study exposed the policy's underlying "intricacies and complexities."<sup>110</sup> The study focused on what is in reality a patchwork of diverse local policies, riddled with a variety of exceptions, and created "a quantitative summary of China's current fertility policy, informing what is pursued in terms of population control nationally, on the basis of diverse local policies."<sup>111</sup> Most importantly, it determined that "[t]he majority of the Chinese population (more than 70 percent) live in areas with a policy fertility level at 1.3 to 2.0 children per couple."<sup>112</sup>

Furthermore, and perhaps most surprising to the researchers, the study found "that levels of government-mandated fertility and

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110. Gu Baochang et al., *China's Local and National Fertility Policies at the End of the Twentieth Century*, 33 *POPULATION & DEV. REV.* 129-30 (2007).

111. *Id.* at 130.

112. *Id.* at 144.

achieved fertility have converged in China.”<sup>113</sup> That is, the population largely complies with the policies. While the study did find that a one-child target was still a dominant goal among the disparate policies, the complexity and flexibility of the policies reflect a regime that has been largely localized and tailored to meet diverse and conflicting needs.<sup>114</sup>

Originally, the policy was in fact more monolithic. In 1979, faced with massive starvation and economic stagnation, China adopted its national population control policy to stabilize growth by the year 2000,<sup>115</sup> which set a minimum marriage age for men and women and, subject to certain exceptions, announced a policy that generally attempted to limit each couple to having one child via a system of incentives and disincentives administered by a State Family Planning Commission. But early on, the official policy prohibited “forced

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113. *Id.* at 145.

114. *See id.* at 144 (characterizing the convergence as “extraordinary, even for China where the political will of the leadership . . . is virtually unparalleled in the world”).

115. *See Xu Ming Li v. Ashcroft*, 356 F.3d 1153, 1159-60 (9th Cir. 2004) (detailing the petitioners’ experiences with what the court termed China’s “Coercive Population Control Program”). In a 1991 official White Paper on human rights in China, the Chinese government stated that “[m]ore than a quarter of the annual addition to the national income is consumed by the new population born during the same year.” INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., HUMAN RIGHTS IN CHINA § VIII (1991), available at [http://english.peopledaily.com.cn/whitepaper/4\(8\).html](http://english.peopledaily.com.cn/whitepaper/4(8).html) (last visited Feb. 10, 2010) [hereinafter 1991 WHITE PAPER]; *see also* Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People’s Republic of China*, 18 HOUS. J. INT’L L. 557, 566 (1996). Zhang notes that:

The population of China, growing at a rate of fourteen million per year, reached 1.185 billion at the end of 1993. Although the government plan in the 1980s set a goal to control the population growth rate in order to keep the population under 1.2 billion until the year 2000, the population of the Chinese mainland surpassed that milestone in 1995. The revised government plan calls for restricting the population growth rate so that the total population will not exceed 1.3 billion before the year 2000, 1.4 billion before the year 2010, or 1.5 to 1.6 billion before the middle of the twenty-first century. The Chinese government maintains that without effective control the rapid population growth could threaten the subsistence of the Chinese nation, leading to catastrophe and an exodus of refugees.

*Id.* (footnotes omitted). China is home to one-fifth of the world’s population, which is “squeezed onto 7 percent of the world’s arable land.” *Matter of Chang*, 20 I. & N. Dec. 38, 41 n.2 (1989).

measures”<sup>116</sup> and exempted China’s minority groups.<sup>117</sup> When China enacted its first family planning laws in 2002, prospective parents were encouraged—but not required—to comply with the law by limiting themselves to one child.<sup>118</sup> The UC Irvine study found that “the majority of rural couples who have one child go on to have a second birth.”<sup>119</sup>

As the study also notes, the policies are implemented by local committees and volunteers, which devise their own regulations to meet the Commission’s quotas.<sup>120</sup> The policies are enforced with punishments and incentives ranging from imprisonment and fines to cash awards and better housing, though some officials have employed more coercive and illegal methods such as forced abortions and sterilization.<sup>121</sup> One scholar has attributed the existence of such coercive tactics to the fact that policy objectives could not otherwise be met in the face of a higher than expected level of “popular resistance.”<sup>122</sup>

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116. See Zhang, *supra* note 115, at 563-67 (observing that although the government prohibited “coercive methods,” occasional abuse occurred); see also Charles E. Shulman, *The Grant of Asylum to Chinese Citizens Who Oppose China’s One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 316-19 (1996) (describing how China’s population control policy was enforced by a combination of incentives and punishments).

117. Shulman, *supra* note 116, at 319; Zhang, *supra* note 115, at 561.

118. Gu Baochang et al., *supra* note 110, at 131.

119. *Id.* at 130.

120. See *id.* at 131.

121. See Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 894-95 (2000) (providing examples of inherently coercive measures designed to achieve Chinese population policy goals, such as harassing pregnant women and the creation of “qualified birth control villages,” where each couples’ ability to live and have children is predicated on whether the other couples in the village have complied with the family planning laws); see also Graciela Gómez, *China’s Eurgemics Law as Grounds for Granting Asylum*, 5 PAC. RIM L. & POL’Y J. 563, 567-68 (1996) (providing a detailed explanation of the enforcement methods, including the amount of discretion and flexibility that local officials have in determining how to enforce the policy). See generally Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program*, 8 YALE J.L. & FEMINISM 145 (1996) (detailing the history of the program, examining its regional and national legality, and exploring the contradictory governmental policies that have grown out of the program).

122. See Li, *supra* note 121, at 152.



In defending its policies against international criticism, China stated that it “has only two alternatives in handling its population problem: to implement the family planning policy or to allow blind growth in births. . . . Which of the two pays more attention to human rights and is more humane?”<sup>123</sup> It later implied that unbridled reproduction competes with other “human rights,” including the right to subsistence, the “most important of all human rights.”<sup>124</sup> According to China, its family planning policies seek to “combine the universal principles of human rights with its national conditions.”<sup>125</sup>

Individual reproductive behaviour and the needs and aspirations of society should be reconciled. . . . All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities towards the community.<sup>126</sup>

China’s constitution considers both the individual rights of parents and parents’ community responsibilities. It addresses the policy specifically, stating that “both the husband and wife have the duty to practice family planning,” and further stipulating that individual rights may not impinge on collective societal interests.<sup>127</sup>

Of course, as with most legal regimes, enforcement of China’s family planning policies has included coercive enforcement measures, some of which violate international human rights law. This issue has become especially prominent in China and abroad since the arrest and sentencing of Chen Guangcheng, who recently exposed a large number of forced abortions and sterilizations that

123. 1991 WHITE PAPER, *supra* note 115, § VIII.

124. *See id.* at § I (tasking the Chinese government with “secur[ing] a well-off livelihood for the people throughout the country”).

125. INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., WHITE PAPER ON POPULATION IN CHINA ¶ 10 (2000) [hereinafter 2000 WHITE PAPER].

126. INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., FAMILY PLANNING IN CHINA § VII (1995) (quoting World Population Plan of Action, G.A. Res. 3344 (XXIX), U.N. GAOR, 29th Sess., U.N. Doc A/RES/3344 (1974)).

127. Shulman, *supra* note 116, at 316 (quoting XIAN FA [Constitution] 49 (1982)); *accord* Zhang, *supra* note 115, at 562.

were carried out by local family planning officials,<sup>128</sup> and since Jin Yani, a woman living in Changli County, Hebei Province, sued in 2007 for the extensive damages she claims to have suffered as a result of a forced abortion procedure at the hands of local family planning officials.<sup>129</sup> But as Mrs. Jin's suit demonstrates, and as has been noted by several commentators (including the organization on Human Rights in China which has been highly critical of China), such forced measures, including sterilization and abortion, are prohibited by law nationally in China,<sup>130</sup> and the central family planning Commission claims to have arrested and fired local officials that have engaged in such measures.<sup>131</sup>

Despite such abuses (which may be a part of a larger problem of balancing human rights and law enforcement in China), as a matter of state policy, implementation and enforcement of the policy are "left to local and provincial officials responsible for ensuring compliance through economic sanctions, peer pressure, and propaganda."<sup>132</sup> Compliance with the policies is normally tied to official employment status and salary, and most of the enforcement occurs through that and other economic sanctions such as fines, or

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128. Calum MacLeod, *Chinese Rights Champion Ordered to Prison; Convicted After Drawing Attention to Forced Abortions, Sterilizations*, USA TODAY, Aug. 25, 2006, at A4.

129. See Richard Spencer, *Chinese Woman in Legal First Over Abortion Case*, TELEGRAPH (U.K.), July 1, 2008, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/01/07/wchina107.xml> (last visited Feb. 10, 2010) (noting that when Mrs. Jin conceived, she was not yet twenty years old, which is the legal minimum age for becoming pregnant under current laws).

130. See *id.*

The Law on Population and Family Planning was passed in 2001 in an effort to address abuses by local family planning workers . . . . The new law bans practices such as abandonment, infanticide, and the use of physical force or the confiscation of property as a means of enforcing the policy. The law also replaces the fines that had once been levied for out-of-plan births and implements instead a 'social compensation fee.' The fee and payment schedule for couples that have out-of-plan births is based on average county income levels.

HUMAN RIGHTS IN CHINA, U.S. HOUSE OF REPRESENTATIVES: COMM. ON INT'L RELATIONS: "CHINA: HUMAN RIGHTS VIOLATIONS AND COERCION IN ONE CHILD POLICY ENFORCEMENT" 2 (2004).

131. David Eimer, *China Admits Women Were Forced to Have Abortions*, THE INDEPENDENT (U.K.), Sep. 21, 2005, at 29.

132. Gómez, *supra* note 121, at 567.

social compensations fees.<sup>133</sup> In all, the enforcement is tied to the closely-knit economic and social structure of each local community, and the pervasive influence of the local family planning committees.

Lisa Gregory argues that China's family planning policies must be looked at in light of their role in allowing the China to meet its international economic and social rights obligations:

[F]rom a theoretical point of view, the economic inducements which constitute an essential component of [China's] population policies do not in fact violate international human rights laws relating to a couple's procreative rights. Reproductive rights, like many other types of 'human rights,' are not totally unrestricted . . . . Thus, parents who insist upon having more children in the face of economic sanctions, may, in the Chinese context, reasonably be viewed as behaving irresponsibly – as exposing their families to significant financial hardships and the community to a Malthusian nightmare.<sup>134</sup>

However, she is quick to condemn as human rights violations de facto instances of tactics such as "coerced abortions, forced sterilizations and involuntary insertion of intrauterine devices," as well as de jure discrimination against children born out of local quotas.<sup>135</sup>

Still, the most pressing question is whether "economic inducements," or other expressive forms of law that do not clearly violate international human rights norms, constitute the sort of family planning guidance that the CRC may require. Note that while China implemented its family planning regimes in the face of

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133. *See id.* at 567-68.

134. Lisa B. Gregory, Note, *Examining the Economic Component of China's One-Child Family Policy Under International Law: Your Money or Your Life*, 6 J. CHINESE L. 45, 46 (1992) (citations omitted); *see also* Timothy John Fitzgibbon, Comment, *The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementations*, 20 LOY. L.A. INT'L & COMP. L. REV. 325 (1998) (observing that the "penalties and consequences" that parents face when they violate the Convention include fines, disqualification for certain benefits for their children, and termination from employment).

135. Gregory, *supra* note 134, at 46-47, 86-87.

overwhelming pro-nationalist cultural norms,<sup>136</sup> three decades later, the family planning policies have largely been internalized.<sup>137</sup>

In its “concluding observations” on China’s second CRC periodic report, the Committee noted that China had substantially reduced poverty, met key MDGs, and had taken action to eliminate selective abortion, infanticide, and non-registration of children at birth.<sup>138</sup> It said nothing about the relationship between the family planning regimes, and obligations created by the CRC. However, officials in China have claimed that its family planning programs have played an integral, if not decisive, role in the nation’s historic and unprecedented social and economic development,<sup>139</sup> development which has helped China to better meet its obligations under the CRC:

Since the implementation of the family planning program, over 300 million births have been averted nationally, thus saving a great amount of payment for the upbringing of children for the society. This has alleviated the pressure of the excessive population growth on the natural resources and environment, thus contributing to the economic development and the improvement of the people’s living standards.

With the gross national product (GNP) quadrupled over that of 1980 ahead of schedule, the Chinese people now live a relatively comfortable life. By the end of 1999, the population under the poverty line in the rural areas has decreased from over 250 million in the late 1970s to 34 million, down from 33% to around 3% of the total rural population. The impoverished people in rural areas have basically achieved adequate feeding and clothing.<sup>140</sup>

136. See Zhang, *supra* note 119, at 560-61 (noting that, as late as 1974, Chinese spokesmen favored “rapid population growth”).

137. See Yilin Nie & Robert J. Wyman, *The One-Child Policy in Shanghai: Acceptance and Internalization*, 31POP. & DEV. REV. 313, 333-34 (2005) (concluding that the one-child policy today is considered so normal in Shanghai that its status as a law might be unnecessary).

138. Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Committee on the Rights of the Child, at 1, 5-7, 14 U.N. Doc. CRC/C/CHN/CO/2 (Nov. 24, 2005) [hereinafter Consideration of Reports].

139. See Zhang Weiqing, *Population – The Key Issue for Continued Economic Progress in China*, 10 CHINESE J. OF POPULATION SCI. 55 (1998) (believing population control to be essential for continued economic progress in China).

140. 2000 WHITE PAPER, *supra* note 125, ¶ 7.

It would be easy to dismiss these reports as state propaganda. But, the link they draw between rigorous population control and family planning measures, and economic growth is consistent with the demographic dividend discussed above.<sup>141</sup> Experts note that:

The difference between a total fertility rate of 2.1, which might have been achieved without [China's] policy, and a total fertility rate of 1.6 (found today) releases 24% more resources for the family and national investment. The Indian economy has begun to grow rapidly, but unlike China the decline in fertility has been uneven, and states such as Bihar and Uttar Pradesh (total fertility rates of 4.4 and 4.8) remain mired in poverty.<sup>142</sup>

Economic progress in China has been accompanied by equivalent social progress in terms of education, health, and the empowerment of women.<sup>143</sup> This progress is not simply a state policy goal—the achievement of which requires derogating from reproductive rights. It is also the *fulfillment* of certain economic and social rights that China is obligated to provide, having signed and ratified the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>144</sup> Because the U.S. has not historically recognized such positive rights (and indeed is not even a state party to the CRC), U.S. commentators who criticize China's family planning programs often overlook this fact.<sup>145</sup>

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141. See BLOOM ET AL., *supra* note 17 (discussing the relationship between fertility rates and economic growth).

142. Malcolm Potts, *China's One Child Policy*, 333 BRIT. MED. J. 361, 361(2006).

143. See 2000 WHITE PAPER, *supra* note 125, ¶ 7 (citing increases in the number of students attending college, the literacy rate, access to health care, and the number of women in the workplace).

144. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3; The Secretary-General, ICESCR: China: Notification, C.N.7.2002.TREATIES-1 (*Depositary Notification*) (Jan. 3, 2002), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en#EndDec).

145. See Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man*, 30 U. PA. J. INT'L L. 1211, 1212 (2009) (“The United States has . . . yet to become a party to the ICESCR.”); Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 393 (2009) (observing that almost 200 countries aside from the United States have ratified the CRC).

### III. COUNTERARGUMENTS: ECONOMIC GROWTH, THE RIGHT TO PROCREATE, JUSTICIABILITY, AND DISCRIMINATION

There are, of course, several counterarguments to reading the CRC as requiring efforts to curb procreation in sub-standard conditions. Moving from what I view as the weaker arguments to the stronger, it could be said (1) that real fertility rate declines would eventually have negative economic and therefore developmental consequences; (2) this interpretation is inconsistent with, and leads states to violate, prospective parents' right to procreate, which is protected under international human rights regimes; (3) reading the CRC to protect the rights of prospective children creates rights and duties that are not justiciable; and finally (4) implementing the CRC in this way would inevitably prove *de facto* discriminatory, in that the right to procreate may often hinge on prospective parents' property, disability, birth, education or other status.<sup>146</sup> I cannot do full justice to these arguments in this brief article, but I would like to say something about each.

With regard to the first, I do not find it at all persuasive. As discussed above, reducing high fertility rates can create opportunities for economic growth when combined with specific educational, health, and labor-market policies. In contrast, sustained high fertility rates ensure more dependents than producers and prevent development by tying up resources that could otherwise be used for economic investment and family welfare.<sup>147</sup> Those making this counterargument usually argue that overall economic growth will eventually slow as the population ages. This ignores what researchers have called the "second dividend," in which older populations invest

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146. Implementing the CRC in a discriminatory manner would be contrary to the Convention's explicit instructions to states parties to avoid discrimination. *See* Convention on the Rights of the Child, *supra* note 1, art. 2 ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.").

147. *See* BLOOM ET AL., *supra* note 17, at 28-30 (explaining that reduced fertility rates increase educational opportunities for both children and women).

heavily in the economy.<sup>148</sup> More importantly, this counterargument is premised on an archaic view of economics and development that presumes growth is eternal and the world's resources are infinite.<sup>149</sup>

The second counterargument is that reading the CRC in the way I suggest requires states to violate prospective parents' right to procreate, which is itself protected under international law. That argument seems to suggest that the right to procreate has no internal moral constraints (which runs headlong into all of the moral theorists' arguments above, especially those made by O'Neill and Archard).<sup>150</sup> It also suggests that, contrary to most rights theories, the right to procreate cannot be limited by conflicting rights.<sup>151</sup>

This counterargument would probably hinge on Article 23(2) of the International Covenant on Civil and Political Rights ("ICCPR"),<sup>152</sup> which guarantees the right "to found a family," as well as similar provisions in other binding conventions and more expansive rights formulations in some recent non-binding declarations. Elsewhere I have argued at length that while there is a human right to procreate (embodied in part by Article 23(2)), when considering the narrow formulations in binding "hard law" sources in contrast to the broad formulations in "soft law" non-binding sources, the right should be considered satiable such that a state may balance it against conflicting rights after a parent has replaced him or herself.<sup>153</sup> Others, like Carl Wellman, have argued that any

148. See *id.* at 39-42 (suggesting that this "dividend" stems from the the number of people participating in the work force, an increased tendency toward saving, and investments in human capital). Older generations invest in human capital by, for example, paying for younger generations to obtain higher education. *Id.* at 41-42.

149. See, e.g., HERMAN E. DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT 1 (1996). Daly refers to sustainable development as "resisted by most economic and political institutions, which are founded on traditional quantitative growth and legitimately fear its replacement by something as subtle and challenging as qualitative development." *Id.*

150. O'Neill and Archard both assert that adults have duties and moral obligations to their prospective children. See *supra* Part I.B.

151. See, e.g., STEINER ET AL., *supra* note 66, at 154-55 (organizing various rights into categories ranging between non-derogable and permissibly limited rights).

152. International Covenant on Civil and Political Rights art. 23(2), Mar. 23, 1976, 1999 U.N.T.S. 171 [hereinafter ICCPR].

153. See generally Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 27-37, 44-63 (2007) (examining the ways in which the right to procreate is constrained by other rights, including the rights of prospective

international human right to procreate is simply indeterminate and controversial.<sup>154</sup> Moreover, the Human Rights Committee, in *Aumeeruddy-Cziffra v. Mauritius*, found that the level of protection available for families under Article 23 “depend[s] on different social, economic, political and cultural conditions and traditions.”<sup>155</sup> Thus, a state might legitimately consider its available resources when balancing the procreative right, at least after replacement, against the rights of prospective children.

Most problematically, this counterargument, based on a broad or limitless procreative right, seems to place all importance on the prospective parents’ *act of creation* as opposed to the interests of the *child created*. This is inconsistent with the CRC. Barbara Bennett Woodhouse recently noted,

Ratification of the United Nations Convention on the Rights of the Child . . . has been consistently opposed in the United States, with much of this opposition coming from defenders of the “traditional” family. These opponents believe that the Convention’s attempt to articulate a scheme of rights for children undermines the rights of parents. I believe that this concern is unjustified and that it reflects the continuing influence of a “property theory” of parenthood that was discredited long ago.<sup>156</sup>

I would argue that Woodhouse’s point is even more apposite for prospective children. We are wrong to see them as future property to which we are entitled and to discount their interests. This error is reflected in claims of a broad or limitless procreative right.

In contrast to ICCPR Article 23(2), which establishes the vague and arguably satiable right “to found a family,”<sup>157</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)<sup>158</sup> requires signatories to ensure that men and women

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children).

154. See CARL WELLMAN, *MEDICAL LAW AND MORAL RIGHTS* 135 (2005).

155. Communication No. 35/1978 from the U.N. Hum. Rts. Comm., ¶ 9.2(b)(ii), U.N. Doc. CCPR/C/12/D/35/1978 (Apr. 9, 1981).

156. Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 313 (1998).

157. ICCPR, *supra* note 152, art. 23(2).

158. Convention on the Elimination of All Forms of Discrimination Against



have “[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”<sup>159</sup> This seems to assure, in a binding “hard law” convention, a much broader procreative right. However, it has been argued that CEDAW merely “presumes the existence of procreative freedom in order to create an equal protection requirement.”<sup>160</sup> CEDAW thus aims to eliminate discrimination between the sexes in the enjoyment of rights, but it relies on the Universal Declaration of Human Rights (“UDHR”),<sup>161</sup> ICCPR, and ICESCR as having established the underlying substantive rights CEDAW addresses.<sup>162</sup> States agree under CEDAW Article 16 to eliminate discrimination by ensuring that men and women have the “same rights to decide freely and responsibly.”<sup>163</sup> If a state recognizes a broader procreative right as part of its law, it must ensure that men and women may exercise that right equally; CEDAW does not create any new rights, but rather seeks to bolster rights already provided by the UDHR, ICCPR, and ICESCR.

Put more simply, CEDAW should not be interpreted as creating a broader right to procreate for women than that enjoyed by men, but should instead be read as establishing parity between the two genders. If anything, there might be good reasons—beyond the scope of this article—for reading CEDAW to guard women against a broad “right” to have as many children as biologically possible and casting them as perpetual mothers subject to prenatal social and cultural norms that might operate within the scope of that right.

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Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (Sep. 3, 1981) [hereinafter CEDAW].

159. *Id.* art. 16(1)(e). Note, however, that an unusual number of countries have entered reservations to the treaty and Article 16 in particular, making it “one of the most reserved international human rights documents.” Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT’L L.J. 1, 19 (1996).

160. Walter C. Long, *Escape from Wonderland: Implementing Canada’s Rational Procedures to Evaluate Women’s Gender-Related Asylum Claims*, 4 UCLA WOMEN’S L.J. 179, 235 n. 244 (1994).

161. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

162. See CEDAW, *supra* note 158, pmbl.

163. *Id.* art. 16(1)(e).

Note that China's family planning policies (as opposed to some instances of its enforcement) have generally not been questioned by CEDAW's implementing body.<sup>164</sup> In the last round of reporting and examination by that body, the only questions raised and the recommendations made relate to China's need to take further action to halt selective abortion and female infanticide (which are acts committed by the citizenry and not the state) and to further investigate and prosecute any acts of forced sterilization and forced abortion.<sup>165</sup> Nothing was said with regard to workplace demotion and social compensation fees violating international law.

The third counterargument is that while my reading of the CRC may seem like the morally right thing to do, it creates rights that are nonjusticiable. Given that my argument does not alter the content of children's rights, this counterargument seems to be focused on the fact that the rights-holder is a class of future persons, i.e. prospective parents' prospective children. As discussed earlier, future persons can have rights that we ought to respect now,<sup>166</sup> for example, in the case of trusts.<sup>167</sup> Ensuring justiciability in such cases is mostly a matter of appointing a class trustee or representative. In most cases, I

164. See Carmel Shalev, *China to CEDAW: An Update on Population Policy*, 23 HUM. RTS. Q. 119, 119 (2001) ("China's population policy had raised questions at previous reportings and continued to be of particular concern, not on a substantive level, but in relation to coercion in the implementation.")

165. See Comm. on the Elimination of Discrimination against Women, Pre-session Working Group, *List of Issues and questions with regard to the consideration of periodic reports: China*, ¶ 19, U.N. Doc. CEDAW/C/CHN/Q/6 (Aug. 7-25, 2006) (requesting a description of the "concrete measures in place to ensure full adherence to the Law on Population and Family Planning of 2001"); Comm. on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: China*, ¶¶ 17, 32, U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 7-25, 2006) (urging China to take measures to verify that its family planning policies are being implemented in a lawful manner).

166. See Meyer, *supra* note 71, § 3.2.

167. See Storrow, *supra* note 48, at 2309. Storrow observes that,

[i]n a little-discussed area of the law in which the best interests of the unconceived are of paramount concern, trust law doctrine prohibits the living beneficiaries of a trust to invade the trust's corpus after the settlor has died unless it would be in the best interests of the unborn or unascertained beneficiaries of the trust.

*Id.* Storrow also explores the concept of "virtual representation," whereby the living beneficiaries of a trust may represent the interests of unconceived beneficiaries to the extent that their interests are "sufficiently similar." *Id.*

assume the state would play that role, similar to the modified role of *parens patriae* it plays in cases involving temporary “no procreation” orders and to the role it theoretically could play (via local family planning officials) in more comprehensive legislation like China’s family planning regime, with its system of court-enforceable and externality-shifting “social compensation fees” for children born out of quota.

As when U.S. courts issue temporary “no procreation” orders, states might choose to implement parents’ obligations to prospective children so that (as a purely practical matter) they only engage after the parent has failed to fulfill or protect the CRC rights of one of his or her existing children. Under such an approach, (1) the state would already have exercised relevant jurisdiction over the parent(s) at issue, (2) the parent(s) would already have had a child, which at least according to some views of the procreative right, would make limiting that right more feasible, and (3) the existing child has the opportunity to assert a claim that he/she has rights at stake in whatever limited resources are at issue that prevent those resources from being further divided. Moreover, in this scenario, the CRC standards can be implemented by treating the prospective procreative parent as a prospective adoptive parent and applying the same justiciable standards.

If this response seems rather far-fetched (aside from the fact that the requisite institutional structure is not in place in many of the states parties to which these arguments might apply), it is because the whole counterargument of nonjusticiability is mistimed. It gets us far ahead of ourselves because there is currently no sense, in international human rights discourse, of CRC obligations towards prospective children. As noted in the Introduction, this article focuses on *why*, not *how*, we should account for obligations to prospective children. We cannot implement a norm that does not exist or that we have not agreed should exist.

That said, there are concrete steps that could be taken to begin to create the norm. The Committee could take up the issue in one of its general comments, specifying that Article 24(2)(f) should be read to require states parties to take appropriate measures to “develop preventive health care, guidance for parents and family planning

education and services”<sup>168</sup> based on the assumption that prospective children deserve the standards called for by the CRC. The issue could also be taken up at the next U.N. International Conference on Population,<sup>169</sup> where, traditionally, international human rights norms regarding procreation have been hammered out, and from which a binding treaty on population growth and reproductive health may eventually arise. The norms developed at the next conference could incorporate reference to the CRC and call on states to promote the rights of prospective children.

More realistically, and even absent any international cooperation, CRC states parties could simply choose to promote the CRC as a standard prospective parents should strive to meet and engage in a variety of norm-changing “offensives”<sup>170</sup> to protect the rights of prospective children, using the states’ public education and consensus-signaling functions to achieve change. They could also implement changes in domestic legislation regulating the family, taxes, reproductive health, housing, welfare, and property, among others, to promote the CRC objectives. As alluded to above, though little has been written of late, the influence of law on fertility rates was thoroughly studied and vast norm changes were actually implemented decades ago when fears of overpopulation took on Malthusian proportions. That work<sup>171</sup> could be expanded upon and further implemented using the CRC as a benchmark. Law can change norms in the absence of coercion and perhaps must operate that way when it comes to seemingly intimate matters.<sup>172</sup> Even implementing a nominal compensation fee scheme could, in theory, begin to shift

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168. Convention on the Rights of the Child, *supra* note 1, art. 24(2)(f).

169. See, e.g., Report of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, ch. VII, ¶ 7.3, U.N. Doc A/CONF.171/13.

170. See VERHELLEN, *supra* note 7, at 146 (asserting that the the CRC embodies an “offensive approach” through which states must actively promote children’s rights against infringement).

171. For a wonderful summary of some of that work see generally POPULATION AND LAW: A STUDY OF THE RELATIONS BETWEEN POPULATION PROBLEMS AND LAW (Luke T. Lee & Arthur Larson eds., 1971).

172. See generally JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM (2002) (discussing various legal regimes that have altered cultural norms concerning intimate matters, including reproductive rights, sexual orientation, and sexual harassment).

cultural tendencies toward considering the welfare of children before they are born.

Finally, perhaps the best counterargument against reading the CRC in the way I suggest is that doing so would conflict with CRC Article 2 (as well as various other human rights conventions), in that a prospective parent's right to procreate would often hinge on his or her property, disability, birth, or other status. Whether or not policies targeted a particular class of people, the simple implementation of CRC standards in this way might have disproportionately prejudicial effects.<sup>173</sup> There are several legal responses to this point, depending on the particular type of discrimination alleged. The best response is that each state party has a duty to prevent de facto discrimination by reallocating resources among its citizens, regardless of whether the CRC applies to existing *or* prospective children. Both classes of children require resources, and if parents are lacking them, the CRC obligates the state to assist them. While the prospective-child approach, even after resource reallocation, would shift some of the prejudicial burden from children's rights onto prospective parents' procreative rights, that would not be inconsistent with the purposes of the CRC.

Perhaps the greater concern is not the inequality within individual states parties as much as between states parties and the possibility that using the CRC as a threshold would simply ensure greater fertility rates in wealthy nations. As with discriminatory effects within particular States Parties, the tension here is between, on the one hand, the need to mitigate those effects and, on the other hand, the danger of simply relativizing and rendering the CRC as meaningless. One could make use of Ronald Green's argument that the threshold should be thought of as the child's national birth cohort,<sup>174</sup> which would soften international discriminatory effects. There is also of course the question of international redistributive justice and the obligations states parties have to the prospective children that will come to exist in other states. Regardless of how

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173. *C.f.* D.H. & Others v. Czech Republic, App. No. 57325/00, 43 Eur. H.R. Rep. 923 (2006) (discussing de facto discrimination in the context of domestic education requirements).

174. Coleman, *supra* note 47, at 53.

they are addressed, the discriminatory effects question poses a challenge for this reading of the CRC.

## CONCLUSION

If none of the reasons above seem to compel reading the CRC as placing obligations on prospective parents, one other reason might. Reams have been written of late regarding the failure of the United States to ratify the CRC. And while a new U.S. presidential administration and changes in Congress may mean that ratification will soon occur, the “positive rights” nature of the treaty remains an enduring objection to ratification.<sup>175</sup> Reading the CRC in the way that I propose would, to some degree, address that objection, by taking a more nuanced view of rights as intricately bound up with correlative duties.

If we read the CRC as protecting the rights of prospective children by placing some obligations on their would-be parents, we are left in the rather incongruous position of almost pretending that we cannot anticipate and prevent Convention violations, when in fact we can. It would be better to admit that we have chosen to elevate, prioritize, and orient our reading of the CRC around some value other than child welfare, such as procreative freedom. However, in the end, that would do little to serve the millions of children that will be born into the conditions the Convention seeks to eradicate.

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175. See generally David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 81 (2006) (observing that some religious groups in the United States have strong objections to the CRC because of a general concern that many of the rights afforded to children under the Convention have the effect of significantly undermining parental rights and impermissibly intruding upon the family).